(3)

Supreme Court, U.S.
FILED
MAY 11 2000
CLERK

No. 99-1497

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, _____

S. KIMBERLY BELSHE, Director, California Department of Health Services, *Petitioner*,

v.

CHILDREN'S HOSPITAL AND HEALTH CENTER, et al., *Respondents*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

BILL LOCKYER, Attorney General
of the State of California
CHARLTON HOLLAND
Senior Assistant Attorney General
STEPHANIE WALD
Supervising Deputy Attorney General
ASHER RUBIN (State Bar No. 33188)
Deputy Attorney General
Counsel of Record
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102
Telephone: (415) 703-5503
Fax: (415) 703-5480
Counsel for Petitioner

10 pp

TABLE OF CONTENTS

	Page
ARGUMENT	1
I. THE HOSPITALS' RESPONSE TO OUR MOOTNESS ARGUMENT IS INADEQUATE.	1
II. THE CASE CITED BY PLAINTIFFS ARE NOT PERSUASIVE.	4
III. PLAINTIFFS' ARGUMENT CONCERNING EQUAL ACCESS IS IRRELEVANT.	5
CONCLUSION	6

TABLE OF AUTHORITIES

	Page
Cases	
Multicare Medical Center v. Washington 768 F.Supp. 1349 (W.D.Wash. 1991)	4
West Virginia Univ. Hosps., Inc. v. Casey 885 F.2d 11 (3rd Cir. 1989)	4
Wilder v. Virginia Hosp. Assn. 496 U.S. 498 (1990)	3
Statutes	
42 Code of Federal Regulations §§ 447.200, 447.204, 447.250(b) 447.253(a)(2), 447.300-361	5-6\
42 United States Code § 1396a	3
§ 1396(a)(13)(A)	2
§ 1396a(a)(30)(A)	5
§ 1396r-4	2
§ 1983	3
Social Security Act § 1902	3
Other Authorities	
H.R.Rep. No. 149, 105th Cong., 1st Sess., p. 591	3

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, _____

No. 99-1497

S. KIMBERLY BELSHE, Director, California Department of Health Services, *Petitioner*,

v.

CHILDREN'S HOSPITAL AND HEALTH CENTER, et al., *Respondents*.

Petitioner files this Reply Brief pursuant to Supreme Court Rule 15(6).

ARGUMENT

I

THE HOSPITALS' RESPONSE TO OUR MOOTNESS ARGUMENT IS INADEQUATE

One of the principal arguments we made in our petition is that this case is moot. We discussed the Eleventh Amendment, prospective versus retroactive application, the effect of the repeal of the Boren Amendment, etc. The hospitals have failed to address our arguments on these points. Instead, the plaintiffs argue that Boren was "amended." (Opp., p. 6.) It wasn't amended; it was repealed. Similarly, the hospitals state that "both the Boren Amendment and its successor are contained in the same statute." (Opp., p. 7) This makes no sense. Once a statute is repealed it is off the books; it does not merge into or become part of a successor statute.

Plaintiffs state that, "It is ironic that the CDHS continues to operate under the Boren Amendment and to violate its requirements..." (Opp., p. 7.) That statement is erroneous. We are not operating under the Boren Amendment. Even if we wished to do so, that would be impossible since the statute has been repealed.

Plaintiffs also argue that the new statute contains language relating to disproportionate share hospitals (DSH) similar to the old language in Boren and therefore the DSH issue is not moot.[1/] (Opp., p. 8.) The fact is that the DSH provision in the Boren Amendment had a different effect and was in a different context from the DSH language in the new statute.

In contrast to Boren, the new statute at 42 United States Code section 1396a(a)(13)(A) contains no language requiring payments to be "reasonable and adequate" or to meet any other minimum payment standard. The Boren Amendment's DSH provision was interrelated with the now repealed "reasonable and adequate" requirement. Specifically, the Boren Amendment required that the rates, which the state finds to be "reasonable and adequate," must be "determined in accordance with methods and standards ... which ... take into account the situation of hospitals which serve a disproportionate number of low income patients with special needs." In the new federal statute, the DSH provision stands alone and is not part of a process for determining "reasonable and adequate" rates. Also, unlike the Boren Amendment, the new statute's DSH provision expressly states that payments must be made "in a manner consistent with section 1923" of the Social Security Act (42 U.S.C. § 1396r-4).[1/]

---

1. In conjunction with their discussion of the DSH program, plaintiffs point out that a number of states make such payments to out-of-state

Another important difference between the Boren Amendment and the successor statute concerns the fact that this court relied on the "reasonable and adequate" provision to hold that the Boren Amendment created a right for providers that was enforceable under 42 United States Code section 1983. (Wilder v. Virginia Hosp. Assn., 496 U.S. 498, 509-515 (1990).) The "reasonable and adequate" language is gone and the bulk of the new statute simply requires a public notice and comment process so that interested persons have an opportunity to comment on proposed rates. In comments regarding the Boren Amendment's repeal, the House Report stated:

> "[I]t is the committee's intention that, following enactment of this Act, neither this not any other provision of § 1902 of the Social Security Act (42 U.S.C. § 1396a) will be interpreted as establishing a cause of action for hospitals and nursing facilities relative to the adequacy of the rates they receive." (H.R.Rep. No. 149, 105th Cong., 1st Sess. p. 591.)

The differences between the repealed Boren Amendment and the federal statute that replaced it after the plaintiffs filed their lawsuit, are so substantial that the existence of a DSH provision in the new federal statute is insufficient to overcome the fact that this case became moot when the Boren Amendment was repealed.

---

hospitals. The fact is that most of the states do not make such payments. We would submit that those that do make such DSH payments are not compelled to do so.

II

THE CASES CITED BY PLAINTIFFS ARE NOT PERSUASIVE

The hospitals rely on two decisions for the proposition that the Boren Amendment applied to out-of-state hospitals: West Virginia Univ. Hosps. Inc. v. Casey, 885 F.2d 11 (3rd Cir. 1989) and Multicare Medical Center v. Washington, 768 F. Supp. 1349 (W.D. Wash. 1991). We submit that neither case is helpful in resolving the issue.

In West Virginia the court *assumed* that the Boren Amendment applied to out-of-state hospitals. The issue was not argued or discussed. This was acknowledged by the district court in the instant case. The court stated that West Virginia determined that Boren applied to out-of-state hospitals by implication. However, it conceded, "No court appears to have ever squarely addressed the particular question of whether reimbursement methods for out-of-state hospitals must comply with the Boren Amendment..." [2/] (App.C, p.58a.)

Multicare was a district court case in the state of Washington. The decision comprised 50 pages. A single paragraph of that lengthy decision states that Washington should make disproportionate share payments to out-of-state

---

2. Curiously, the West Virginia court appears to have applied the Boren Amendment to out-of-state border hospitals but not to other hospitals distant from the state border. No authority is given for this distinction and no such distinction was made by the Boren Amendment.

border hospitals.[3] (768 F.Supp. at 1388.) That conclusion was based on the opinion of the HCFA regional office. In the instant case HCFA pointed out in its amicus brief that a regional office cannot make HCFA policy and it disavowed the position taken by its regional office. (See the dissent of Justice Sneed, App. A, p. 27a, fn. 4.) HCFA's official position could hardly be more unequivocal than its statement on p. 10 of its amicus brief, "Thus, in the decade and one-half since Congress enacted the Boren Amendment, the Secretary's actions corroborate her view that the provision does not apply to out-of-state facilities." (Emphasis added.) This statement takes away the underpinning for the position taken by the district court in Multicare.

III

PLAINTIFFS' ARGUMENT CONCERNING EQUAL ACCESS IS IRRELEVANT

On pages 5 and 6 of their opposition, the hospitals inexplicably make an argument concerning the equal access provisions of 42 U.S.C. §1396a(a)(30)(A). Plaintiffs' complaint in this action presents no issue concerning that statute and any arguments with respect to the scope of that statute are irrelevant. Notwithstanding the lack of relevance, we note that plaintiffs' position that the equal access statute applies only to physician services is plainly wrong. The statute on its face applies to all providers, not only physicians. This is consistent with the views of the federal government. (42 C.F.R.

---

3. As in West Virginia the court in Multicare made the puzzling distinction between border hospitals and hospitals which are not on the border of the neighboring state. In both cases the courts were impermissibly legislating, not relying on the extant language of the Boren Amendment.

sections 447.200, 447.204, 447.250(b), 447.253(a)(2), and 447.300-361.)

CONCLUSION

Plaintiffs have failed to refute our contention that the case is moot nor have they convincingly demonstrated why HCFA's official position should be disregarded. Finally, on the merits, plaintiffs have failed to establish that the Boren Amendment applied to out-of-state hospitals. For the reasons stated, we respectfully urge the court to grant the petition.

Dated: May 8, 2000.

Respectfully submitted,

BILL LOCKYER, Attorney General
of the State of California
CHARLTON HOLLAND
Senior Assistant Attorney General
STEPHANIE WALD
Supervising Deputy Attorney General

ASHER RUBIN
Deputy Attorney General
Counsel of Record

Counsel for Petitioner

AR:md

SF1995CV1476

c:\dat\ar\Children.reply.USS